

BEFORE THE
POSTAL REGULATORY COMMISSION

Changes Concerning Attributable Costing : Docket No. RM2016–13
:

UNITED PARCEL SERVICE, INC.'S COMMENTS ON
NOTICE OF PROPOSED RULEMAKING
ON CHANGES CONCERNING ATTRIBUTABLE COSTING

(October 17, 2016)

INTRODUCTION

On September 9, 2016, the Postal Regulatory Commission (“Commission”) issued Order No. 3507, a Notice of Proposed Rulemaking inviting public comment on proposed changes to title 39 of the Code of Federal Regulations as they relate to attributable costs. United Parcel Service, Inc. (“UPS”) submits the following comments on the proposed changes to the Commission’s regulations.

As set forth below, this rulemaking is premature because the prior order (Order No. 3506) that provides the underlying basis for the rulemaking is now under review by the U.S. Court of Appeals for the D.C. Circuit. Accordingly, UPS respectfully requests that the Commission withdraw the Notice of Proposed Rulemaking and not enact the proposed changes to Commission regulations at this time.

To be clear, UPS believes the Commission should only defer changes to its *regulations* at this time. The specific changes to Postal Service costing practices directed in Order No. 3506 – that is, the requirement that the Postal Service attribute incremental costs and that it provide additional information for each of its cost segment

sub-reports – should be implemented immediately, even while consideration of changes to the Commission’s regulations are deferred pending appellate review.

ARGUMENT

As stated in the Commission’s Notice of Proposed Rulemaking: “The primary purpose of the rulemaking is to make conforming changes to rules that specifically define or describe attributable costs, pursuant to Commission Order No. 3506.” Order No. 3507 at 1. In particular, the rulemaking would change Commission regulations to make clear that, “pursuant to Order No. 3506, attributable costs must also include those inframarginal costs calculated as part of a competitive product’s incremental costs (in addition to a product’s volume-variable costs and product-specific fixed costs).” *Id.* at 4. UPS agrees that the changes to the regulations appear to be an accurate reflection of the Commission’s conclusions as stated in Order No. 3506. UPS believes, however, that issuing conforming regulations at this time is unwarranted.

On October 7, 2016, UPS filed in the D.C. Circuit a petition for review of Order No. 3506. The D.C. Circuit has jurisdiction to review the Commission’s Order pursuant to 39 U.S.C. § 3663. Before the D.C. Circuit, UPS will challenge the analysis and conclusions in Order No. 3506, including the Commission’s decision to treat incremental costs as a proper standard for satisfying the statutory requirement to “ensure that each competitive product covers its costs attributable.” 39 U.S.C. § 3633(a)(2). Thus, the D.C. Circuit’s decision will directly affect the proposed regulatory changes in Order No. 3507, which are based entirely on conforming to the conclusion of Order No. 3506 that the incremental-cost test comports with the Postal Accountability and Enhancement Act (“PAEA”). See Order No. 3507 at 4-5.

If the D.C. Circuit vacates Order No. 3506, then the new regulations would be improper. Even if the D.C. Circuit affirms Order No. 3506, its reasoning may affect how best to conform new regulations to the order. In either case, revising the regulations now has the potential to create unnecessary procedural complications for the Commission and for interested parties. After engaging in this rulemaking proceeding, the Commission may have to initiate another rulemaking in response to the D.C. Circuit decision — or, if this Commission did not do so, interested parties may request such a rulemaking. The prudent course, therefore, is to wait until the D.C. Circuit resolves the petition for review, and then the Commission can make a proper determination of the course of action that is consistent with the D.C. Circuit's decision. Simply put, changes to the Code of Federal Regulations should not be made as an interim measure while awaiting an authoritative decision on the governing law from the Court of Appeals.

As noted above, deferring these proceedings related to the regulations should not affect the Postal Service's obligation to comply with the changes directed by the Commission in Order No. 3506. Specifically, the Postal Service should calculate the product-level incremental costs of its products, as directed by the Commission (Order No. 3506, at 60-62), and should provide the additional information for each cost segment sub-report specified by the Commission (*id.*, at 108). The Postal Service's obligation to comply with these directives does not depend on changing the Commission's regulations.

Finally, while UPS recognizes that the Commission disagreed with UPS's Proposal One, UPS respectfully submits that the order is legally and factually incorrect. As explained in detail in UPS's filings in Docket No. RM2016-2, which UPS incorporates

by reference herein,¹ the incremental-cost rule that would be adopted in the regulations is neither sufficient nor correct under PAEA. Congress directed the Commission to “ensure that each competitive product” sold by the Postal Service “covers its costs attributable,” 39 U.S.C. § 3633(a)(2), including all “direct and indirect postal costs attributable . . . through reliably identified causal relationships,” 39 U.S.C. § 3631(b). By failing to require the Postal Service to attribute more than incremental costs to competitive products, the Commission is failing to give effect to the statute. By limiting attributable costs to incremental costs, the proposed regulations would fail to attribute the vast majority of variable costs to competitive products regardless of whether those costs could be reliably attributed.

For related reasons, limiting attributable costs to incremental costs conflicts with Congress’ purpose in PAEA to ensure that “the Postal Service will compete on a level playing field, under many of the same terms and conditions as faced by its private sector competitors, albeit with stronger controls, oversight, and limitations in recognition of its governmental status.” H.R. Rep. No. 109-66 at 44 (2005). While the Commission’s proposal to attribute only incremental costs to competitive products would include more costs than the Postal Service’s current attribution of only marginal costs, this difference is not significant in practice, given the similarity of marginal and incremental cost calculations at the individual product level.

¹ These filings include: Petition Of United Parcel Service, Inc. For The Initiation Of Proceedings To Make Changes To Postal Service Costing Methodologies, Dkt. No. RM2016-2 (Oct. 8, 2015); Proposal One – A Proposal To Attribute All Variable Costs Caused By Competitive Products To Competitive Products Using Existing Distribution Methods, Dkt. No. RM2016-2 (Oct. 8, 2015); and Reply Comments of United Parcel Service, Inc. Regarding UPS Proposals One and Two, Dkt. No. RM2016-2 (Mar. 25, 2016).

As a result, the Postal Service will possess an ever greater advantage over private-sector companies like UPS, arising from the fact that the Postal Service has been granted the letter monopoly. As UPS showed in its petition, if the Postal Service is allowed to assume, for cost attribution purposes, that individual competitive products are riding for free (or nearly free) on a network built and paid for by the letter monopoly, the Postal Service has an artificial advantage when it comes to setting prices for competitive products that no private-sector company could match.

CONCLUSION

For the foregoing reasons, UPS respectfully requests that the Commission withdraw the Notice of Proposed Rulemaking and not enact the proposed changes to Commission regulations at this time.

Respectfully submitted,

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